

The cable monopolists, as expected, have taken far too much liberty with both the law and the evidence. While the program lineups of DIRECTV and other alternative MVPD providers undeniably reflect the acquisition of substantial programming (though Comcast SportsNet now is noticeably absent from DIRECTV's lineup), the Commission has no way of knowing at what relative cost such alternative MVPDs have obtained the program rights, or whether the terms and conditions agreed to are truly non-discriminatory.⁷³ And for these incumbents to seriously claim that there is no longer a need for program access rules is absurd, given the Commission's express findings just last month that local MVPD markets are still characterized by "barriers to both entry and expansion by competing distributors."⁷⁴

In addition, the Commission should not infer the absence of a problem simply from the number of program access complaints that have proceeded through the full adjudication process. The modest number of complaints reaching that stage more likely indicates (i) that the mere existence of the program access rules has succeeded generally in bringing vertically integrated programmers to the bargaining table, and (ii) that aggrieved parties balance the costs, competitive interests, probability of obtaining a meaningful remedy, and possibility of retaliation before filing a program access complaint against a primary programming supplier. The low number also reflects the many program access cases that are settled. In reality, the complaints that actually proceed through the Commission's adjudication process to final decision are only the tip of the iceberg when viewed as a general indicator of the problems that alternative MVPDs

⁷³ See Kennard Letter at 1 (noting that FCC had no information available concerning the terms and conditions of contractual arrangements of non-vertically integrated programmers).

⁷⁴ 1997 Report at ¶ 11.

have with securing meaningful access to programming.

The program access complaint process should be improved and refined, as the record in this proceeding reflects.

A. A Damages Remedy Would Enhance The Commission's Program Access Enforcement Regime

Taken as a whole, the record confirms the present need for a compensatory mechanism, (i) to deter program access violations more effectively, and (ii) to alleviate actual competitive injury suffered by alternative MVPDs attempting to compete against incumbent cable operators.

First, contrary to the assertions of program access opponents, the current rules have not adequately deterred would-be program access violators. Echostar, for example, has pending a complaint against a programmer that already has been found in violation of the rules on two previous occasions.⁷⁵ This fact speaks negatively about the rules' current deterrent effect.

Moreover, there is significant disagreement as to whether forfeitures alone provide a sufficient deterrent to program access violations. In light of the continuing anticompetitive conduct exhibited in today's program access environment, it seems clear that the prospect of a forfeiture does not adequately constrain such behavior, especially because the Commission has yet to impose forfeitures in this context.⁷⁶ Because the rules do not require an offending party to reimburse a successful plaintiff for any injury caused, the rules facilitate a cost-benefit analysis under which the mere possibility that the program access violator will face a

⁷⁵ Echostar Comments at 8.

⁷⁶ See Wireless Cable Assoc. Comments at 16; *see also* Ameritech Comments at 22 (arguing that forfeiture alone is an inadequate deterrent).

fine as a result of its unlawful behavior simply is too remote to pose much of a check on the perceived benefits of denying a competitor access to critical programming.⁷⁷ The prospect of accruing damages will counter this imbalance, encouraging instead negotiation and swift disposition of program access disputes, which is clearly in the public interest.⁷⁸

A second, independent need for damages is to compensate aggrieved parties for actual competitive harm caused by unlawful conduct of a cable operator or its vertically integrated programmer. As recent Commission program access cases have shown, and as numerous commenters expressed, the program access environment can give rise to unique and substantial economic harm inflicted upon alternative MVPDs emerging as competitors to the incumbent cable industry.⁷⁹ Yet, the Commission's current rules utterly fail to remedy the real competitive harm inflicted upon these emerging competitors. Moreover, because program access violations can diminish the competitiveness of program offerings in a service industry facing customers that are especially attuned to program quality, this injury compounds over the many months that it takes to litigate a program access complaint. Damages are appropriate to address this problem.⁸⁰

Cablevision claims that imposing damages will undermine the statute's allowance

⁷⁷ See Echostar Comments at 10.

⁷⁸ See Wireless Cable Assoc. Comments at 16-17; Ameritech Comments at 19.

⁷⁹ Wireless Cable Assoc. Comments at 15-16; Echostar Comments at 9;

⁸⁰ Proving program access damages, much like proving antitrust damages, is not "impossibly speculative," Comcast Comments at 7, and injured alternative MVPDs should be granted the opportunity to demonstrate the measure of competitive harm caused by a cable operator or vertically integrated programmer's unfair business conduct.

of differential pricing by programmers under certain statutorily-delineated circumstances.⁸¹ The argument is that the presence of damages creates an untenable litigation risk that would “effectively deter” programmers from charging otherwise legitimate price differentials to requesting MVPDs.⁸² But this position is without merit. Damages under any proposal can be imposed only for proven program access violations. What Cablevision really objects to is the imposition of stricter penalties for noncompliance with the Commission’s rules. And while this may deter at the margin some pricing practices by vertically integrated programmers, the more important policy objective by far in this context is to deter programmers’ anticompetitive behavior.

The cable industry also argues that imposing damages conflicts with the Commission’s interpretation that no actual injury need be shown for Section 628(c) violations.⁸³ Yet, these two positions are entirely consistent and easily reconciled. The 628(c) showing concerns the liability phase of a program access complaint process. Regardless of whether actual competitive harm has been shown during the course of the liability determination, once the Commission makes an affirmative finding of liability, the program access plaintiff should be permitted to seek compensatory damages to remedy any actual injury that it can reasonably prove.⁸⁴

⁸¹ Cablevision Comments at 27-28.

⁸² *Id.* at 28.

⁸³ *See* 47 C.F.R. § 76.1002.

⁸⁴ DIRECTV supports the proposal to have, when needed, a supplemental damages pleading cycle after liability has been determined. *See* Echostar Comments at 11.

B. The Commission Should Adopt A Limited Form Of Discovery

DIRECTV agrees with the basic notion that alternative MVPDs do not need full-fledged discovery in all program access cases. However, because MVPDs are particularly vulnerable to anticompetitive behavior by the entrenched cable industry while simultaneously dependent upon that industry to produce documentation necessary for supporting program access violations, some form of automatic right to limited discovery is appropriate and necessary.⁸⁵ Several parties have pointed out that limited discovery coupled with an adequate protective order will significantly reduce confidentiality concerns and the fear of cable operators that the discovery process will spin out of control. Indeed, if alternative MVPDs abuse this right and file frivolous actions, then they should be sanctioned accordingly.

The commenters advocating limited discovery generally agree, as does DIRECTV, that the Commission should require a complainant to submit discovery requests at the same time the complaint is filed; the program access defendant should then produce the documents along with its answer or shortly thereafter.⁸⁶ There is no reason to put off production of relevant documents, and there is every reason to reduce the number of extraneous pleadings by incorporating discovered facts into the initial pleading cycle.

C. Parties On Both Sides Agree That The Commission's Resolution Of Program Access Complaints By An Established Deadline Is In the Public Interest

There is a consensus that, consistent with the Commission's statutory directive, Section 628 requires expeditious *resolution* of program access complaints, and not simply an

⁸⁵ See BellSouth Comments at 11-13; Wireless Cable Assoc. at 9-10, 12 (discussing need for automatic, limited right to discovery); Ameritech Comments at 14 (calling for production of key documents).

⁸⁶ Echostar Comments at 7; Ameritech Comments at 4, 15.

expedited pleading schedule as urged by the NCTA.⁸⁷ Program suppliers and MVPD competitors alike acknowledge the benefits of knowing that by a date certain the Commission will have resolved a program access complaint.⁸⁸ While parties favoring swifter resolution of program access complaints differ somewhat on the exact length and structure of the Commission's decision-making period, DIRECTV believes that all of them would be superior to today's average eight-month period for adjudicating program access complaints. DIRECTV accordingly supports this change in the rules.

V. CONCLUSION

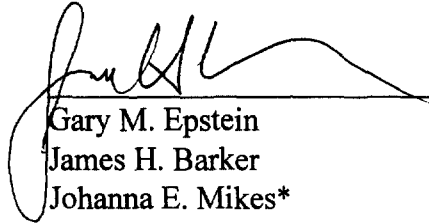
The Commission has the authority to address terrestrial evasion, and should do so for the reasons outlined by DIRECTV and other alternative MVPDs. The public interest consequences are simply too dire for the Commission to allow the cable industry so easily to flout the program access law.

DIRECTV also supports the proposed procedural changes to the program access complaint process. These improvements will enable the Commission to more effectively target anticompetitive behavior by cable incumbents.

⁸⁷ See NCTA Comments at 5.

⁸⁸ See Liberty Media Comments at 30; HBO Comments at 4; Ameritech Comments at 8; Wireless Cable Assoc. Comments at 14.

Respectfully submitted,



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Dated: February 23, 1998